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16
17 UNITED STATES DISTRICT COURT
18
19 CENTRAL DISTRICT OF CALIFORNIA

20
21 TRAFFICSCHOOL.COM, INC., a
22 California corporation; DRIVERS ED
23 DIRECT, LLC., a California limited
liability company,

24 Plaintiffs,

25 v.

26 EDRIVER, INC., ONLINE GURU,
27 INC., FIND MY SPECIALIST, INC.,
28 and SERIOUSNET, INC., California
corporations; RAVI K. LAHOTI, an
individual; RAJ LAHOTI, an
individual; DOES 1 through 10,

Defendants.

Case No. CV067561 PA (CWx)
The Hon. Percy Anderson

DEFENDANTS' CLOSING BRIEF

Complaint Filed: November 28, 2006
Trial Commenced: November 6, 2007

TABLE OF CONTENTS

		<u>Page</u>
1.	Introduction	1
2.	Plaintiffs Lack Standing	1
3.	Plaintiffs Have Failed To Prove Lanham Act False Advertising.....	4
4.	3.1. DMV.ORG Is Not Literally False or Misleading	5
5.	3.2. The DMV.ORG Website Does Not Have The Tendency To 6. Deceive A Substantial Segment Of Reasonably Prudent 7. Consumers	6
8.	3.2.1. Actual Confusion	6
9.	3.2.2. The Maronick Surveys Provide No Reliable Information 10. On The Question of Confusion.....	9
11.	3.2.3. The Hollander Survey, Correcting For The Maronick 12. Survey Errors, Shows No Statistically Significant 13. Confusion.....	10
14.	3.3. No Evidence Of Intent To Deceive.....	11
15.	3.4. No Proof That DMV.ORG Affects The Purchasing Decision.....	12
16.	3.5. Plaintiffs Have Not Shown Any Causal Connection Between The 17. Alleged False Advertising And Their Purported Injuries	14
18.	4. Plaintiffs' Cal. Bus. & Prof. Code § 17200 Claim Fails.....	15
19.	5. Defendants Have Established Plaintiffs' Unclean Hands.....	16
20.	6. Defendants Have Established The Defenses Of SOL and Laches.....	18
21.	7. The Ninth Circuit Applies Equitable Defenses In Lanham Act Cases	20
22.	8. Remedy	20
23.	8.1. Plaintiffs Are Not Entitled To Any Monetary Relief.....	20
24.	8.2. Plaintiffs Are Not Entitled To Any Injunction	23
25.	9. Conclusion	25

TABLE OF AUTHORITIES

Federal Cases

<u>A&H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.,</u>	
57 F.Supp.2d 155 (E.D. Pa 1999).....	7
<u>ALPO Petfoods v. Ralston Purina Co.,</u>	
913 F.2d 958 (D.C. Cir. 1990).....	22, 23
<u>Ambrosia Chocolate Co. v. Ambrosia Cake Bakery, Inc.,</u>	
165 F.2d 693 (4th Cir. 1947)	19
<u>Avis Rent A Car System, Inc. v. Hertz Corp.,</u>	
782 F.2d 381 (2nd Cir. 1986)	5
<u>Bandag, Inc. v. Al Bolser's Tire Stores, Inc.,</u>	
750 F.2d 903 (Fed. Cir. 1984)	22
<u>Barrus v. Sylvania,</u> 55 F.3d 468 (9th Cir. 1995).....	2
<u>Berkey Photo Co., Inc. v. Eastman Kodak Co.,</u>	
603 F.2d 263 (2d Cir. 1979)	2
<u>Better Business Bureau, Inc. v. Medical Directors Inc.,</u>	
681 F.2d 397 (5th Cir. 1982)	5
<u>Century 21 Real Estate Corp. v. Re/Max South County,</u>	
882 F.Supp. 915 (C.D. Cal. 1994).....	15, 21
<u>In re Circuit Breaker Litigation,</u>	
860 F.Supp. 1453 (C.D. Cal. 1994).....	24
<u>Contessa Food Products, Inc. v. Lockpur Fish Processing Co., Ltd.,</u>	
2003 U.S.Dist. LEXIS 26682 (C.D. Cal. 2003)	22
<u>Downtowner/Passport Intern. Hotel v. Norlew,</u>	
841 F.2d 814 (8th Cir. 1988)	21
<u>Emco, Inc. v. Obst,</u>	
2004 U.S.Dist. LEXIS 12118 (C.D. Cal. 2004)	16
<u>FTC v. Sterling Drug, Inc.,</u> 317 F.2d 669 (2d Cir. 1963).....	5
<u>Faberge, Inc. v. Saxony Products, Inc.,</u> 605 F.2d 426 (9th Cir. 1979)	22
<u>Forschner Group v. Arrow Trading Co.,</u>	
124 F.3d 402 (2nd Cir. 1997)	23
<u>Fuddruckers, Inc. v. Doc's B.R. Others, Inc.,</u>	
826 F.2d 837 (9th Cir. 1987)	17
<u>Fuller Bros., Inc. v. Int'l Mktg., Inc.,</u>	
870 F.Supp. 299 (D. Or. 1994).....	2
<u>Gail Green Licensing & Design Ltd. v. Accord, Inc.,</u>	
2006 WL 28773202 (N.D. Ill. 2006).....	2
<u>Grupo Gigante SA DE CV v. Dallo & Co., Inc.,</u>	
391 F.3d 1088 (9th Cir. 2004).....	19, 20

1	<u>Haagen-Dazs v. Frusen Gladje, Ltd.</u> , 493 F.Supp. 73 (S.D.N.Y. 1980)	17
2	<u>Halicki v. United Artists Comm., Inc.</u> , 812 F.2d 1213 (9th Cir. 1987).....	2
3	<u>Hall v. Wright</u> , 125 F.Supp. 269 (S.D. Cal. 1954)	17
4	<u>Highway Cruisers of Cal. v. Sec. Industries</u> , 374 F.2d 875 (9th Cir. 1967)	21, 22
5	<u>Int'l Ass'n of Machinists v. Winship Green Nursing Ctr.</u> , 103 F.3d 196 (1st Cir. 1996)	4, 7
6	<u>International Order of Job's Daughters v. Lindeburg</u> , 633 F.2d 912 (9th Cir. 1980)	16
7	<u>Jackson v. Okaloosa County, Florida</u> , 21 F.3d 1531 (11th Cir. 1994).....	2
8	<u>Japan Telecom, Inc. v. Japan Telecom Am., Inc.</u> , 287 F.3d 866 (9th Cir. 2002)	17
9	<u>Jarrow Formulas, Inc. v. Nutrition Now, Inc.</u> , 304 F.3d 829 (9th Cir. 2002)	19, 20
10	<u>Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals</u> , 19 F.3d 125 (3rd Cir. 1994)	9
11	<u>Lindy Pen Co., Inc. v. Bic Pen Corp.</u> , 982 F.2d 1400 (9th Cir. 1993)	22
12	<u>Maier Brewing Co. v. Fleischman Distilling</u> , 390 F.2d 117 (9th Cir. 1968)	22
13	<u>Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd.</u> , 817 F.Supp. 1103 (S.D.N.Y. 1993).....	10
14	<u>NFL Props., Inc. v. Prostyle, Inc.</u> , 57 F.Supp.2d 665 (D. Wis. 1999).....	10
15	<u>Nat'l Distillers Prods. Co. v. Refreshment Brands, Inc.</u> , 198 F.Supp.2d 474 (S.D.N.Y. 2002)	10
16	<u>Nikkal Industries Ltd. V. Salton, Inc.</u> , 735 F.Supp. 1227 (S.D.N.Y. 1990)	15, 21
17	<u>Nutri/System, Inc. v. Con-Stan Industries, Inc.</u> , 809 F.2d 601 (9th Cir. 1987)	7
18	<u>Pizza Hut, Inc. v. Papa John's Intern., Inc.</u> , 227 F.3d 489 (5th Cir. 2000)	14
19	<u>ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic and Sports Physical Therapy P.C.</u> , 314 F.3d 62 (2d Cir. 2002)	20, 21
20	<u>Simon Prop. Group L.P. v. mySimon, Inc.</u> , 104 F.Supp.2d 1033 (S.D. Ind. 2000)	10
21	<u>Southland Sod Farms v. Stover Seed Co.</u> , 108 F.3d 1134 (9th Cir. 1997)	4, 5, 12
22	<u>Sugai Products, Inc. v. Kona Kai Farms, Inc.</u> , 1997 WL 824022, 11 (D. Haw. 1997).....	2, 4
23		
24		
25		
26		
27		
28		

1	<u>Summit Technologies v. High-Line Medical Instruments, Co.,</u>	2
2	933 F.Supp. 918 (C.D. Cal. 1996).....	2
3	<u>Taubman v. Webfeats</u> , 319 F.3d 770 (6th Cir. 2003).....	8
4	<u>Therma-Scan, Inc. v. Thermoscan, Inc.</u> , 295 F.3d 623 (6th Cir. 2002)	7
5	<u>Transworld Airlines v. American Coupon Exchange,</u>	
6	913 F.2d 676 (9th Cir. 1990).....	18, 19
7	<u>Universal City Studios, Inc. v. Nintendo Co., Ltd.,</u>	
8	746 F.2d 112 (2d Cir. 1984)	10
9	<u>Urecal Corp. v. Masters</u> , 413 F.Supp. 873 (N.D. Ill. 1976)	16
10	<u>Waits v. Frito-Lay, Inc.</u> , 978 F.2d 1093 (9th Cir. 1992)	2
11	<u>Westinghouse Elec. Corp. v. Gen Circuit Breaker & Elec. Supply, Inc.,</u>	
12	106 F.3d 894 (9th Cir. 1997)	24
13	<u>William H. Morris Co. v. Group W</u> , 66 F.3d 255 (9th Cir. 1995)	9
14	<u>State Cases</u>	
15	<u>Meyer v. Sprint Spectrum L.P.,</u>	
16	150 Cal.App.4th 1136 (2007).....	16
17	<u>Statutes</u>	
18	15 U.S.C. § 1117.....	20, 21, 22
19	15 U.S.C. § 1125(a)(1)(B)	2, 4
20	Cal. Bus. & Prof. Code § 17200 et seq.....	16
21	Cal. Bus. & Prof. Code § 17204	16
22	Cal. Civ. Code § 1750 et seq	16
23	Fed. R. Civ. P. 12(h)(3).....	2
24	Fed. R. Civ. P. 26(a)(1)(C)	22
25	<u>Miscellaneous</u>	
26	<u>U.S. DHHS, Research-Based Web Design & Usability Guidelines,</u>	
27	Section 2.1 (2006).....	25
28		

1 **1. Introduction**

2 Consumers flock to DMV.ORG in growing numbers to obtain easy-to-
3 access information on what would otherwise be frustrating transactions with state
4 motor vehicle departments. Plaintiffs seek to deprive consumers of this resource.

5 One commentator has described the battles over unfair competition on
6 the Internet, in the trademark context, as attempts by trademark owners to shut down
7 any unauthorized use without regard to materiality or consumer benefits.
8 Consumers, on the other hand, prefer the competition and lower prices that broader
9 access to information brings. This case fits the description.

10 In this case, the evidence establishes that the motive for litigation is not
11 pro-consumer. The facts have also shown that: (a) there is no statistically significant
12 confusion in the context of the vast number of visitors to DMV.ORG;
13 (b) DMV.ORG has voluntarily made changes to make its mission clearer; and
14 (c) industry evidence, traffic and revenue patterns all suggest that the alleged
15 perception of government affiliation is not material to a purchasing decision.

16 Finally, the evidence also establishes Plaintiffs' own inequitable
17 conduct and unreasonable delay including that: (a) Plaintiffs engage in conduct that
18 is similar and arguably worse than that which they complain of; and (b) Plaintiffs
19 waited for over four years to bring this suit and only did so after efforts to advertise
20 on DMV.ORG failed (the: "if you can't join 'em, shut em down approach").

21 For the reasons summarized below, Defendants request that this Court
22 enter judgment for Defendants in this matter.

23 **2. Plaintiffs Lack Standing**

24 "Whenever it appears by suggestion of the parties or otherwise that the
25 court lacks jurisdiction of the subject matter, the court shall dismiss the action."
26 Fed. R. Civ. P. 12(h)(3). See also Jackson v. Okaloosa County, Florida, 21 F.3d
27 1531, 1536 n. 5, 1541 (11th Cir. 1994) (standing can be revisited at trial or summary
28 judgment if not supported by evidence); Berkey Photo Co., Inc. v. Eastman Kodak

1 Co., 603 F.2d 263, 289 (2d Cir. 1979) (holding that plaintiff, after a full trial, had
2 only proved de minimis injury and accordingly was not entitled to judgment).

3 To establish standing to sue for false advertising under Lanham Act
4 § 1125(a)(1)(B), plaintiff must show that it has suffered "a discernibly competitive
5 injury." Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1109 (9th Cir. 1992) (analyzing
6 false advertising prong – 1125(a)(1)(B)) (citing Halicki v. United Artists Comm.,
7 Inc., 812 F.2d 1213 (9th Cir. 1987)).

8 For an injury to qualify as "competitive," it must be "harmful to the
9 plaintiff's ability to compete with the defendant." Barrus v. Sylvania, 55 F.3d 468,
10 470 (9th Cir. 1995) (dismissing for lack of standing, emphasis added). In other
11 words, plaintiff and defendant must be considered competitors, that is to say,
12 "persons endeavoring to do the same thing and each offering to perform the act,
13 furnish the merchandise, or render the service better or cheaper than his rival."
14 Fuller Bros., Inc. v. Int'l Mktg., Inc., 870 F. Supp. 299 (D. Or. 1994).

15 If parties who are not in direct competition are deemed competitors,
16 then "any two parties with some economic nexus or whose conduct has some
17 economic effect upon the other, could be construed as 'competitors,'" contrary to
18 Ninth Circuit law. Sugai Products, Inc. v. Kona Kai Farms, Inc., 1997 WL 824022,
19 *11 (D.Hawaii 1997) (quoting Summit Technologies v. High-Line Medical
20 Instruments, Co., 933 F.Supp. 918 (C.D. Cal. 1996). See also Gail Green Licensing
21 & Design Ltd. v. Accord, Inc., 2006 WL 28773202, *5 (N.D. Ill. Oct. 5, 2006)
22 (finding plaintiffs, who develop, acquire, and license many commercial products,
23 unable to assert a "discernibly competitive injury" since they are not in the same
24 business as defendants, retailers/manufacturers of pet accessories and clothing).

25 Plaintiffs allege competition on three bases: (a) Plaintiffs offer traffic
26 school and drivers education services through their websites, while DMV.ORG acts
27 as a referral source in California and other states for third party schools; (b) "both
28 Plaintiffs and Defendants act as a referral source for third party traffic schools and

1 drivers education in various states"; and (c) "both Plaintiffs and Defendants
2 advertise other third party services and receive financial consideration from those
3 third parties." [TAC, ¶ 20(a)-(c).] The latter two bases are the only viable bases
4 upon which the parties may be deemed to compete, as the Court has already rejected
5 the first basis on Defendants' initial motion to dismiss. [1-24-2007 Order.]

6 Considering the grounds for Plaintiffs' standing – competition in the
7 business of advertising and referring consumers to third parties – the evidence
8 reveals that Plaintiffs and Defendants are not competitors in any meaningful sense.
9 Significantly, Plaintiffs' core businesses consist of providing traffic school and
10 drivers education courses to consumers. [Defendants' [Proposed] Findings of Fact
11 ("DF"), 15-17.] By contrast, Defendants' core business is internet publishing, with
12 its revenue derived from advertising the services of others. [DF 11-13.]

13 Although Plaintiffs allege that they also refer consumers to third party
14 traffic schools and driver's ed providers in states outside of California, in actuality
15 Plaintiffs' referral revenue in 2006 and 2007 is less than \$10,000 gross (nominally
16 insignificant) and less than 1% of their gross revenues. [DF 22.] TrafficSchool.com
17 never earned referral fees in California and earned no such fees in Texas in 2005-
18 present nor in Florida in 2006-present. [DF 19-21.] Similarly, DriversEdDirect has
19 earned no referral revenue for the advertisement of driver's ed courses. [DF 23.]

20 Plaintiffs' advertising revenues for non-traffic school/drivers education
21 services are even less significant. TrafficSchool.com earned on average less than
22 \$1,000 per year over the last four years and DriversEdDirect earns no more than "a
23 couple hundred dollars a month." [DF 24-26.]

24 Also notably, at trial Plaintiffs again identified other traffic and driver's
25 education school companies as TrafficSchool.com's "competitors" because "they
26 provide the same courses that [Plaintiffs] provide to the same consumers." [DF 18.]
27 Plaintiffs in both their initial complaint and through trial, continue to identify their
28 true competitors as other traffic and driver's ed schools.

1 The fact that Plaintiffs sought to advertise on the DMV.ORG website is
2 further evidence of the lack of competition. [DF 132-135.]

3 Finally, Defendants' attempt to establish "competitive injury" because
4 both parties purchase same keyword advertising must fail. [See Kramer Trial Decl.]
5 First, this supposed injury is not alleged in the operative Third Amended Complaint.
6 Second, Plaintiffs' resort to this new theory demonstrates both the lack of any more
7 direct injury as well as a disregard for Ninth Circuit law which requires some form
8 of competition between the parties as to goods and services.

9 Plaintiffs' have failed to establish any competitive injury. A finding
10 that these parties compete would dramatically stretch the Ninth Circuit's definition
11 of competition. Accordingly, judgment should be entered for Defendants because
12 Plaintiffs lack standing. Sugai Products, Inc., supra, 1997 WL 824022 at *11.

13 **3. Plaintiffs Have Failed To Prove Lanham Act False Advertising**

14 Plaintiffs insist that this case sounds in false advertising even though it
15 appears to be a classic case of false association (under § 1125(a)(1)(A)).

16 Nevertheless, to prevail on a false advertising claim under
17 1125(a)(1)(B), Plaintiffs must prove: (a) defendants¹ made a false or misleading
18 statement in a commercial advertisement about the nature, characteristics, qualities,
19 or geographic origin of a product; (b) the statement actually deceived or has the
20 tendency to deceive a substantial segment of reasonably prudent consumers; (c) the
21 deception is material, in that it is likely to influence the purchasing decision; and (d)
22 plaintiffs have been (or are likely to be) injured by the conduct. 15 U.S.C. §
23 1125(a)(1)(B); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th
24 Cir. 1997); Int'l Ass'n of Machinists v. Winship Green Nursing Ctr., 103 F.3d 196,
25 201 (1st Cir. 1996). Plaintiffs have failed to prove any one of these four elements.

26 When evaluating an alleged false advertisement, the advertisement

27
28 ¹ The alleged liability of defendants other than Online Guru, the manager of the website, has been addressed in Defendants 52(c) motion, on file.

1 must be considered in its full context. Southland Sod Farms, 108 F.3d at 1139; and
2 Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381, 385 (2d Cir. 1986)
3 (courts must "consider the advertisement in its entirety and not ... engage in
4 disputatious dissection"); and FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir.
5 1963) (view the "entire mosaic" not "each tile separately").

6 Yet, Plaintiffs' analysis of the DMV.ORG website is done exclusively
7 by dissection of the website into discrete segments (i.e., search engine results, the
8 domain name in isolation, or even portions of one page of the website in isolation).
9 Plaintiffs' fundamental refusal to look at the entire commercial impression renders
10 much of their analysis and argument unfair and legally meaningless.

11 **3.1. DMV.ORG Is Not Literally False or Misleading**

12 An evaluation of the DMV.ORG website in its full context
13 demonstrates that it is not literally false or misleading.

14 First, the use of the .ORG top level domain is not improper since .ORG
15 TLDs are "open" and "unrestricted" (i.e., anyone can register a .ORG, including
16 commercial entities). [DF 30.] The .GOV top level domain, however, is restricted
17 to federal and state governments. [DF 31.] It is no coincidence that a substantial
18 majority (48) of state motor vehicle departments use the .gov or .us TLD. [DF 31.]

19 No statement on DMV.ORG constitutes an express misrepresentation
20 of fact. [DF 34.] Cf. Better Bus. Bureau, Inc. v. Med. Directors Inc., 681 F.2d 397,
21 399-400 (5th Cir. 1982) (express false claim of approval that the BBB made an
22 "investigation" into the efficacy of the product). To the contrary, DMV.ORG has
23 always included disclaimers and clarifying language specifying that it is not
24 affiliated with any government agency and identifying it as a for-profit corporation;
25 DMV.ORG now includes numerous and prominent reinforcing disclaimers.

26 Since at least September 24, 2002, DMV.ORG has disclaimed at the
27 bottom of each page of the website (in bold since 2003) any government affiliation
28 in text at least the same size as other general text on the site. [DF 35-36.] And,

1 since at least March 17, 2004, the clarifying "welcome statement" on the homepage
2 of DMV.ORG has explained: "Since government sites can sometimes be confusing
3 to use, we have made this guide for the average user to understand." [DF 37.]

4 During litigation, Online Guru has added further disclaimers
5 reinforcing the nature of DMV.ORG in the license plate logo in the left corner of
6 every webpage ("Unofficial Guide") and just below the logo (not affiliated), and in
7 the title caption on the main homepage and on each state homepage ("The Unofficial
8 Guide"). [DF 39.] Online Guru has also changed sponsored listings for DMV.ORG
9 on Google and Yahoo! to reinforce the absence of affiliation by using terms such as
10 "Unofficial" and "Info." [DF 61; and TEs 631, 670-671, attached hereto as Ex. A]

11 Notably, Plaintiffs themselves have admitted that DMV.ORG was
12 "non-offensive" and "not actionable" prior to October 2006. [DF 33.]

13 Though the content of DMV.ORG was revised in October 2006, the
14 elements at issue in this litigation remain similar to what immediately preceded,
15 including: (a) the use of the header "No need to Stand in Line, Your DMV Guide is
16 Now Online"² on the homepage (replaced after suit by "The Unofficial Guide to the
17 DMV"); (b) the use of the introductory sentence, "Since government DMV sites can
18 be confusing to use, we have developed this free & comprehensive guide for the
19 average user to understand"; (c) the use of bottom disclaimers on every page; and
20 (d) the use of the DMV.ORG license plate logo in the top left of every page.
21 [DF 38.] In short, there is no "vast difference" between the February and October
22 2006 versions of the DMV.ORG website.

23 **3.2. The DMV.ORG Website Does Not Have The Tendency To Deceive**
24 **A Substantial Segment Of Reasonably Prudent Consumers**

25 **3.2.1. Actual Confusion**

26 "The law has long demanded a showing that the allegedly infringing

28

² DMV.ORG's use of this tag line dates to 2004, pre-dating California's use of a
similar tag line in the 2006. [11/6 RDT 79:9-80:11; 109:12-110:11.]

1 conduct carries with it a likelihood of confounding an appreciable number of
2 reasonably prudent purchasers exercising ordinary care." Int'l Ass'n of Machinists
3 v. Winship Green Nursing Ctr., 103 F3d 196, 201 (1st Cir. 1996).

4 Evidence of only a small number of instances of actual confusion can
5 be dismissed as inconsequential. See e.g. Nutri/System, Inc. v. Con-Stan Industries,
6 Inc., 809 F2d 601 (9th Cir. 1987) (misdirected letters and checks deemed
7 insignificant in comparison to volume of the parties businesses); A&H Sportswear
8 Co., Inc. v. Victoria's Secret Stores, Inc., 57 F.Supp.2d 155 (E.D. Pa. 1999) (isolated
9 evidence of actual confusion insufficient to establish confusion.); Therma-Scan, Inc.
10 v. Thermoscan, Inc., 295 F.3d 623 (6th Cir. 2002) (misdirected e-mails held "legally
11 insignificant" in comparison to size of defendant's business). And, email confusion
12 may be discounted, as "e-mail messages raise[] the possibility that consumers sent
13 the inquiries to [the wrong company] because they were inattentive or careless, as
14 opposed to being actually confused." Therma-Scan, Inc., 295 F.3d at 636.

15 Plaintiffs' evidence of actual confusion, in context, is insubstantial.

16 For example, Plaintiffs' third party witness, Lisa Warren, was allegedly
17 confused by the advertisement listings on DMV.ORG. [DF 73.] However, she
18 viewed only a single page of the DMV.ORG website for approximately a minute
19 and could not recall the page that she viewed. [DF 73.] Notably, Warren was not
20 looking for traffic school or drivers education services while on DMV.ORG, but
21 rather was in search of official Texas logos (which she did not find). [DF 74.]

22 Warren's visit only illustrates the point that some visitors, not looking
23 to purchase anything, may visit the site very quickly. Any impression that such a
24 visitor forms is not directly relevant to whether a visitor looking to purchase traffic
25 school services is materially misled by the website.

26 Shannon Robertson's confusion may also be regarded as unusual.
27 Defendants showed that although Plaintiffs question each of their students,
28 Robertson was the only one that was found to have been confused. [DF 72.]

1 In fact, other evidence shows that visitors searching for traffic school
2 will generally take care and visit numerous sites before making a purchasing
3 decision. [DF 50-51.] The average visitor to DMV.ORG views more than 5 pages
4 on the site and two-thirds of visitors view either the main homepage or one of the 51
5 state-dedicated sub homepages. [DF 43-44.]

6 No evidence establishes that the small relative number of visitors to the
7 traffic school or driver's ed pages of the DMV.ORG website are different. [DF 45-
8 49.] In fact, to complete a purchase, such a visitor must go to the third party website
9 and navigate through numerous additional pages. [DF 52-53.]

10 Although a few websites and emails may suggest a misunderstanding
11 as to the nature of the website, these instances of confusion are not tied to persons
12 seeking traffic school or driver's education. And, they are not significant in
13 comparison to the 70,000 websites or internet articles that link to DMV.ORG and
14 the millions of visits DMV.ORG receives each week. [DF 40-41, 67, 69-70.]

15 Defendants' control survey, using CAR.ORG, (and Maronick's refusal
16 to conduct such a control) suggests that there is always some baseline level of
17 confusion (1-3%) on the internet. [DF 76-79.] These internet links and consumer
18 emails are indicative of that baseline confusion, and establish nothing more.

19 Furthermore, the numerous and conspicuous disclaimers on
20 DMV.ORG (discussed above) dispel any likelihood of consumer confusion.
21 Taubman v. Webfeats, 319 F.3d 770, 777 (6th Cir. 2003) (disclaimer indicating that
22 site was not the official website for plaintiff's mall negated likelihood of consumer
23 confusion; appellate court reversed preliminary injunction entered by district court).

24 For a business with 60 million visitors annually, it would be surprising
25 if there were no confusion. The existence of modest relative evidence of confusion
26 (less than 1%) is not probative of whether an appreciable number of reasonably
27 prudent consumers are in fact confused. See William H. Morris Co. v. Group W, 66
28 F.3d 255 (9th Cir. 1995) (3% not significant); and Johnson & Johnson-Merck

1 Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, 19 F.3d
2 125 (3rd Cir. 1994) (7.5% not significant, noting that 20% might be sufficient).

3 **3.2.2. The Maronick Surveys Provide No Reliable Information On**
4 **The Question of Confusion**

5 Plaintiffs have also offered the survey results prepared by their expert,
6 Maronick, in an attempt to demonstrate that traffic school consumers in California
7 are confused by DMV.ORG. These results however do not provide meaningful
8 information on the question of consumer perceptions of the DMV.ORG website.

9 As an initial matter, the Maronick surveys tested respondents only in
10 relation to California traffic school, did not address states not using the "DMV"
11 acronym, and gave no opinion as to driver's education. [DF 80.] Thus, the survey
12 results are not applicable to consumer perceptions in any state where Plaintiffs
13 receive referral revenue, and also have no bearing on driver's ed consumers.

14 More importantly, the Maronick survey results do not provide reliable
15 information as to consumer perception of DMV.ORG because of the numerous, and
16 apparently deliberate, design and methodology flaws, including:

- 17 • The failure to mimic a visitor's actual experience through the use of improper
18 stimuli; Maronick tested based upon improper dissection of DMV.ORG into
19 component parts – such as search results (survey 2) and the top two-thirds of
20 a single webpage (survey 3) (a page through which less than 1/3 of one
21 percent of DMV.ORG visitors enter the site);
- 22 • The use of leading questions, that would not be permitted at trial;
- 23 • The unprecedented combination of key questions on the same page creating a
24 demand effect (e.g., "Is this website endorsed by any government agency?"
25 followed on the same page by "What government agency?");
- 26 • The failure to include a control, which Maronick himself has described in
27 literature on surveys as "indispensable" in Lanham Act cases; and
- 28 • The failure to instruct survey respondents not to guess.

1 [DF 81(a)-(e).] Courts have repeatedly found that such errors render survey results
2 unreliable and accordingly deserving of little weight (if any). Universal City
3 Studios, Inc. v. Nintendo Co., Ltd., 746 F.2d 112, 118 (2d Cir. 1984) (survey "so
4 badly flawed that it cannot be used to demonstrate the existence of a question of fact
5 on the likelihood of consumer confusion"); Simon Prop. Group L.P. v. mySimon,
6 Inc., 104 F.Supp.2d 1033 (S.D. Ind. 2000) (survey excluded; survey "must consist of
7 non-leading questions"); NFL Props., Inc. v. Prostyle, Inc., 57 F. Supp. 2d 665, 668-
8 69 (D. Wis. 1999) (excluding survey evidence for failure to include a control); Nat'l
9 Distillers Prods. Co. v. Refreshment Brands, Inc., 198 F.Supp. 2d 474, 484
10 (S.D.N.Y. 2002) (no weight where survey did "not sufficiently replicate marketplace
11 conditions"); Major League Baseball Properties, Inc. v. Sed Non Olet Denarius,
12 Ltd., 817 F. Supp. 1103, 1123-24 (S.D.N.Y. 1993) (holding survey data
13 "meaningless and having no evidentiary value" due to leading questions and failure
14 to use controls), vacated pursuant to settlement, 859 F. Supp. 80 (S.D.N.Y. 1994).

15 The Maronick surveys should therefore be accorded no weight.

16 **3.2.3. The Hollander Survey, Correcting For The Maronick Survey**
17 **Errors, Shows No Statistically Significant Confusion**

18 Defendants' survey expert, Hollander, corrected for the Maronick
19 survey errors and, then found no statistically significant confusion.

20 Specifically, the Hollander surveys tested DMV.ORG as well as a
21 control (CAR.ORG) and used stimuli representative of what an actual visitor to
22 DMV.ORG that goes on to purchase a traffic school from an advertiser on the site
23 would encounter in real life – three DMV.ORG pages (CAR.ORG pages for the
24 control group) plus a third party traffic school page. [DF 76.] (If anything, the
25 Hollander stimuli was conservative - fewer than the average number of pages
26 viewed on the DMV.ORG website and fewer advertiser website pages than would
27 actually be viewed before purchase.)

28 Employing these stimuli with non-leading questions, Hollander found